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FILED
OCT 10 1955
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In The

Supreme Court of the United States

October Term, 1955

No. 38

RAYMOND C. ARMSTRONG,
Petitioner,

v.

MARY R. ARMSTRONG,
GENERAL MOTORS CORPORATION, et al.,
Respondents.

BRIEF FOR MARY R. ARMSTRONG, RESPONDENT

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COURT INDEX PRESS INC. — Law Printers — 809 Walnut St., Cincinnati, O.

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BRIEF FOR RESPONDENT MARY R. ARMSTRONG

Since General Motors Corporation does not plan to file a brief, Mary R. Armstrong will be referred to as the respondent.

STATUTES INVOLVED

The first section of Article IV of the Constitution of the United States provides, "And the Congress may by general Laws prescribe the Manner in which said Acts, Records and Proceedings shall be proved, and the Effect thereof."

By the Act of May 26, 1790, c. 11; 28 U.S.C.A. Section 1738, Congress has provided that:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

FLORIDA

The Florida statutes provide:

"Chapter 65. Section 65.07. ALIMONY PENDENTE LITE. — In every suit *by a wife* for a divorce founded upon any of the grounds mentioned in Section 65.04, she may in the bill for divorce, or by petition, claim alimony and suit money, and if the bill seems well founded, the court shall allow a reasonable sum therefor. Or if a wife defendant in any suit for any divorce shall in *her answer, or by petition*, claim alimony or suit money, and the answer or petition shall seem well founded, the court shall allow a reasonable sum therefor."

"Chapter 65. Section 65.08. ALIMONY UPON DECREE OF DIVORCE. — In every decree of divorce *in a suit by the wife*, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife. In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in a lump sum."

"Chapter 62. Section 62.07. FEES OF MASTERS IN CHANCERY. — The fees of the master shall be as follows:

* * *

"Attendance on unlitigated case, per day $1.00

* * *

"Attendance to settle unlitigated report, per day $1.00

* * *

"Deposition of witness, taking, per 100 words $.25

"For all other services, the same fees as are prescribed for clerks of the Circuit Court. When no such fees are prescribed, then he shall receive such compensation as the judge may fix. All fees shall be taxed as part of the costs of the cause."

OHIO

Section 3105.19: Parties defendant. (G. C. Section 8003-20)

"A person or corporation having possession of, control of, or claiming an interest in property, real or personal, out of which another seeks alimony, may be made a party defendant."

QUESTION PRESENTED

The Ohio courts having held that the respondents right to an adjudication of property rights and alimony could and did survive the Florida divorce decree, the primary question involved is whether that that conclusion conflicts with the Full Faith and Credit Clause of the Constitution.

STATEMENT OF CASE

Raymond C. Armstrong and Mary R. Armstrong (nee Donovan) are natives of Hamilton County, Ohio. About 1914 they began in a small way a business in which they applied rubber tires on vehicles. Mary Donovan furnished part of the initial capital for that business through the sale of a diamond ring which belonged to her and a loan which she obtained from a relative. (R. 24, 78, 152)

She worked with Armstrong in establishing that business, without compensation, (R. 25) until they were married in the year 1917; and, thereafter, until the business was sold about the year 1923, Mrs. Armstrong actively worked in the business. The respondent testified:

"Q. In fact Mrs. Armstrong, the business on Stabler Street was in Mr. Armstrong's name, and the business on Clark Street was in Mr. Armstrong's name; is that right? A. We were partners, and going to be married.

Q. I am just asking. The business on Clark Street was in his name too, wasn't it? A. Yes, sir; everything was in his name as far as I was concerned. I didn't care.

Q. And you married him in 1917? A. On June 18, 1917, yes sir.

Q. And you told the court that between 1914 and 1917 the business belonged to both of you? A. Yes, sir. We worked together every day.

Q. And he took you in as a partner in 1914? A. I put the money in that started us in business, and we were partners.

Q. There was nothing in writing about that? A. With the man I was going to marry I didn't think I needed it."

"Q. And three years before you were married you stated that this business was a partnership? A. It was a partnership from Stabler Street on through Clark Street and all through our life together.

Q. What hours did you put in when you worked on Stabler Street? A. From about nine to six, and sometimes later if wheels had to be delivered for the undertakers, which happened quite often. Sometimes they had to be delivered over the river and we worked later."

"Q. And then you stated that as far as the business was concerned on Clark Street it was in Mr. Armstrong's name, but that you considered yourself a partner? A. No, sir. We both considered me a partner, Mr. Armstrong as well as myself. I helped him, and he consulted me on everything that we done. Everything that we bought he consulted me on, and we talked it over. (R. 52, 53)

The business was successful and out of its earnings they invested in 600 shares of General Motors stock. (R. 116) After the business was sold they went to Florida, and shortly thereafter to the Isle of Pines where they purchased land and en-

gaged in growing fruits and vegetables until a hurricane drove them out. Subsequently, they acquired real estate in Hamilton and Clermont Counties, in Ohio, and in Miami, Florida, and until they finally separated in October, 1950, for the most part they spent their winters in a residence in Miami and their summers, sometimes as late as Thanksgiving, in a residence they maintained in Clermont County, Ohio. (R. 32, 33, 147) Their real estate holdings in Ohio and in Florida were jointly held, as were their bank accounts, which were in Ohio banks, except for a small account in Miami. The property, real and personal, in Florida, when the divorce action was filed was worth about $20,000.00. (R. 172, 173) Notwithstanding difficulties which they encountered in the stock market crash of 1929, they were able to hold their General Motors stock; which through stock dividends, had increased to a holding of 2250 shares when this litigation began. (R. 119, 120, 126) The General Motors stock was registered in the corporation's records in the name of Ray Armstrong, c/o The Cincinnati Bank & Trust Co. (Exhibit C., R. 294) and the dividends were sent to that address and by that bank credited to the Armstrong account, (R. 162), which in 1945 was changed to a joint account of the parties (R. 58). The respondent testified:

> "Q. You stated that these stocks, General Motors and other stocks were going to be transferred to both names, but were not because of the expense of transferring the stocks? A. Well, my husband wrote to the General Motors in I think 1941, and they wrote back and told him about what it would cost, and he mentioned it to me and I said don't bother, leave it as it is.
>
> Q. As a matter of fact, the cost of transfer would only be about thirty-five to fifty dollars, would it not? A. Makes no difference. I didn't want him to bother." (R. 62, 63)

In the summer of 1948 while they were living on their farm near Goshen in Clermont County, Mr. Armstrong hit his wife

with the butt end of a revolver and knocked out some of her teeth, (R. 35, 49, 87), as a result of which they separated.

Mr. Armstrong had told his wife: "I am going to keep the stocks and everything else that we have. I kept you for thirty-four years." (R. 59); and Mrs. Armstrong for the purpose of protecting herself, in obtaining a proper property settlement, at that time took into her own possession, from safety deposit boxes held in their joint names, the General Motors stock certificates and the other stocks involved in this litigation, together with a large part of the bank accounts theretofore held in their joint accounts. Mr. Armstrong was notified at once that it was her purpose to hold what she had taken into her possession until a division of their holdings could be agreed upon. Negotiations for such a settlement extended over a period of several weeks and before a settlement was reached they decided to go back together and from that time until October of 1950 they lived together in Miami, Florida and in Hamilton and Clermont Counties, in Ohio.

As a part of their reconciliation Mrs. Armstrong returned to their joint accounts a part of the money she had withdrawn from the banks and also paid the attorneys' fees which each had incurred while they were separated; and Mr. Armstrong gave to his wife the following signed statement: (Ex. 1 R. 189)

> "Ashville, N. C.; Sept. 27, 1948
>
> I, Raymond C. Armstrong, solemnly before God swear that I love my wife, Mary R. Armstrong, and am assuring her of this because of a terrible misunderstanding. I shall never, never again bring us to the brink of divorce because I know my wife is and has always been working for my best interest and is all a good and faithful wife should be. I shall never bring up unpleasant subjects which have caused her so much worry in the past. Just as soon as possible after I arrive in Cincinnati I shall discontinue all legal actions which are pending and drop all charges I have placed against her. I shall do my utmost to make my wife happy in the future. I have not done so in the

past. The Stocks and moneys and war bonds which are now in the process of litigation she, Mary R. Armstrong, is to keep until such time as she decides to put them as they were before July 1, 1948. The jewelry she possesses is her's alone. I make the above statements of my own free will.

RAYMOND C. ARMSTRONG
Ashville, North Carolina
Sept. 27, 1948"

The behavior of the petitioner that led to the final separation in October, 1950, is described in respondent's testimony (R. 43-46)

"Q. During that time what was Mr. Armstrong's behavior to you? A. He treated me very badly, physically and mentally.

Q. What did he do that you refer to as mental? A. Well, he told me he intended to put me in a mental institution where he could keep me.

Q. What else? A. Also, that I was never to get anything he had; that he had a will made and would see I never got a penny of anything.

Q. What did he do that you refer to as physical? A. He beat me, and every time he passed me at the table he would punch me in the head every time he would pass me at the table.

Q. I will ask you if aside from punching you be made other threats against you? A. Yes, he made threats against me all the time. He was always telling me he was going to kill me, and came into the bedroom, and I would wake with him sitting there and screaming that he would see if his attorney would have me arrested, or get papers to put me away so he wouldn't be bothered with me any more.

Q. During that interval of time, did he at any time have a gun in his possession? A. My husband always had quite a few guns; always slept with one under his pillow.

Q. Did he make any threats against you relating to the use of a gun? A. Several times he put it to my head and was going to blow my brains out. He said that was the best solution to his problem."

Q. What if anything did he do to you? A. He punched me and beat me so badly I couldn't stay with him any longer. I thought he would eventually kill me.

Q. Did you make any statement as to your intention? A. I told him I couldn't take any more, and I couldn't live with him any longer.

Q. What occurred the next day? Where did you go? A. The next day some friends of ours across the water invited us out on a boat ride; so we went, and after we came home Mr. Armstrong resumed the quarreling with me that he had been doing, and came through the room and had a paid of slippers on that had a heavy heel, and he seemed to go mad, and he took the slipper off and beat me across the head and face and fingers and back, and kicked me in the shoulder and it was sore for months after. I lost the nails off my finger and—

Q. That was on Saturday? A. Yes sir.

Q. How soon after he did that was it that you left the house? A. I had to leave that night. I left that night."

* * *

"Q. How were they damaged? A. Well, he had beat me on my hand when I put it up to protect my face, and this slipper, the heel of this slipper damaged my two fingers and they turned dark, the nails, and I lost them, and I tried to turn away and he kept beating me with the heel of the shoe, and kicking me in the shin and in the shoulder and said he was going to finish me.

Q. I will ask you if when you came to Cincinnati, you showed those marks to your sisters? A. Why yes. Anyone could see my face and my head. My sister I think saw my back when I went in the bathroom. I am sure she did.

Q. Now, Mrs. Armstrong, how soon after that did you rent an apartment here in Cincinnati? A. I still hoped for a reconciliation, and stayed with my sister until the tenth of November, to see if he would contact me. I didn't want to leave my husband. I don't like that.

Q. Then what did you do about the tenth of November? A. Rented an apartment at 815 Hermosa.

Q. You lived there at all times did you? A. Yes, sir, I still live there.

Q. You may state whether or not you intend to continue living in Cincinnati? A. I intend to make Cincinnati my permanent home.

Respondent, during November, 1950, notified General Motors Corporation that she held the stock certificates in her possession, in Ohio, and claimed an interest therein. (Exhibits C and D. R. 294, 295). When General Motors Corporation notified petitioner it would withhold payment of dividends pending adjustment of the claimed interest, petitioner's Florida counsel questioned the respondents right to establish a separate domicile in Ohio (Exhibit F. R. 297). After Mr. Ward was informed this was due to petitioners ill treatment (Exhibit G. R. 299) the negotiations for a property settlement were resumed, and when an agreement could not be reached, the appellant filed his complaint in the Florida court in which he sought a divorce.

Petitioner, in his bill, also,

(a) sought to put in issue respondent's right to a separate domicile in Ohio;

(b) to have the court grant a temporary injunction restraining respondent from disposing "of any of the stocks * * * now in her possession"; and

(c) "that in the final decree the defendant shall be directed and ordered to return to the plaintiff all of the stocks and bonds and cash found to be due by the defendant to the plaintiff on an accounting to be taken by the court"; and

(d) "Plaintiff would show unto the court that the interest of the defendant in the property jointly held in the estate by the entirety, half of which will inure to the benefit of the defendant upon a divorce being granted, is ample to support the defendant and that she has no further need of alimony or property settlement. Nevertheless the plaintiff hereby offers to do equity and to abide by such orders or decrees, with reference to the settlement of the property affairs, as to this court may be

deemed equitable; that pending the final decree of divorce in this cause this court will enter a temporary restraining order restraining the defendant from instituting any action concerning the matrimonial status between the plaintiff and defendant and that among other things in the event the defendant fails to obey the injunctive order of this court that this court will order and decree that any interest which the defendant may hold in property in the state of Florida over which this court has jurisdiction, including her interest in the home place, shall be subjected by the court in settlement of the damage caused by the defendant to the end that the court decree there has been a conveyance covering her interest in the home place and personal property, furniture and fixtures contained therein. Plaintiff prays for such other and further relief as to the court may be deemed equitable and proper."

No temporary injunction was granted; the General Motors Corporation was not made a party; and Mrs. Armstrong, on whom there was only constructive service, did not enter her appearance.

Mr. Armstrong did not tell his attorneys anything about the agreement he had signed in Asheville, but on the contrary falsely and fraudulently signed and swore to his complaint that the respondent as a part of their 1948 reconciliation had promised to return the securities and the bank accounts to him and had not done so. The fraud thus practiced upon the Florida court was such that on October 2, 1951, the Florida court entered a decree granting Armstrong a divorce, and in its decree concluded that Mrs. Armstrong's retention of the securities and bank accounts was without his consent, and was illegal to the extent that she was guilty of conversion or embezzlement of her husband's property.

The cause was referred to a special master in chancery who held his hearing at the office of petitioner's attorney (R. 215, 216); and in his deposition offered in this case the petitioner's attorney testified:

Q. After the testimony was completed, both on the first and second order of reference, did you discuss with Mr. Prunty, the master's report? A. Oh, definitely. Yes, sure."

Q. Aside from what you discussed relating to that, did you take any other part in the preparation of the master's report? A. *I do not recall, Mr. Sibbald, whether I did or did not.*

Q. Let me ask you this question: Did you prepare a draft of that report? A. No, sir.

Q. Now, I call your attention to the last paragraph of Mr. Prunty's report wherein he uses these words, "*A special master's fee in this cause has been settled by an agreement between counsel for plaintiff and your master.*" *When* did you have that agreement with Mr. Prunty? A. That is customary here, on these ex parte cases, rather than being no contest on it, they are not bound on divorce cases on a standard rate of pay. That was a customary fee. I do not remember what it was.

Q. My question was: *When* did you have an agreement with Mr. Prunty? A. *I imagine it was about the time he was ready to file the report.* Either that matter is arranged between counsel and agreed to, or set by the court.

Q. You say you do not recall what the amount was? A. I think it was either $200 or $250. That is a customary fee in such cases. I do not recall the exact amount. It was not paid then. It was paid some time afterwards." (R. 291, 292).

The fee customarily allowed by the courts to masters in uncontested divorce actions in Dade County, Florida, amounts to Twenty-five ($25.00) dollars. (Stipulation, R. 311)

In his report the special master found:

"The record in this cause shows that litigation is now pending in the state of Ohio where the plaintiff is seeking to recover from the defendant the possession of the

stocks and bonds, which were wrongfully taken by the defendant from the possession of the plaintiff."

* * *

"*The question of the wife's alimony, if any, cannot be determined at this stage of the proceeding.* At the present time the wife of the plaintiff has in her possession large sums of money belonging to the plaintiff and approximately $100,000.00 in stocks and bonds. In addition thereto, she has a half interest in properties in the state of Ohio and other funds and properties not fully accounted for. I assume that this will be the subject matter of the litigation in Ohio, *and that proper disposition will be made by the courts of that state.*"

* * *

"The defendant is not entitled to receive alimony from the plaintiff under the facts and circumstances presented in this case."

* * *

"2. That no award of alimony be made to the defendant." (R. 243-245)

The Florida decree, which was entered the next day after the master's report was filed, contains the following:

"This court takes recognition of the fact that litigation is now pending in the state of Ohio relative to the recovery of these stocks and bonds as well as the settlement of other matters concerning property rights between the parties. This court *recognizes that the courts of Ohio will have the ultimate determination of the question of property rights where the property itself is in the state of Ohio.* * * *

* * *

"This court, therefore, finds the defendant has not come into this court in good faith or made any claim to the equitable conscience of the court and has made no showing of any need on her part for alimony. It is, therefore, specifically decreed that no award of alimony be made to the defendant * * *". (Decree R. 248, 249).

After the expiration of the required one year from the time she established her separate domicile in Cincinnati, Mrs. Armstrong, on February 1, 1952, commenced this action for divorce, in which she charged the petitioner with gross neglect of duty, extreme cruelty, and with falsely and fraudulently obtaining the Florida divorce. In her amended petition the respondent pleaded the facts entitling her to an equitable division of the corporate stocks which the parties had accumulated; and in her prayer sought such equitable division; and, also, alimony out of the petitioner's share.

The General Motors Corporation, a Delaware corporation, was made a party defendant and service of summons was made upon it through its statutory agent, designated pursuant to Ohio foreign corporation laws. General Motors Corporation after it was summoned withheld payment of dividends, has been represented by counsel and has not contested jurisdiction of the court to make orders binding upon it.

After service upon the petitioner by publication was started and before the publication was approved the petitioner entered his appearance. Thereafter petitioner moved for an order requiring General Motors Corporation to release to him dividends withheld and to pay to him dividends thereafter accruing, which motion the court overruled. General Motors Corporation did not join in that motion.

On January 2, 1953, the petitioner filed his answer in which he pleaded the Florida decree as res judicata "and that by reason thereof, plaintiff cannot maintain this action against said defendant *for divorce*" (Answer R. 8). In his answer no reference was made to the Florida decree as a denial of alimony or as a determination of property rights; and petitioner, depending upon allegations – other than res judicata – prayed:

> "that the court order plaintiff to deliver up to defendant the certificates of stock aforesaid and the jewelry aforesaid, which she has converted to her own use; that

the court make an equitable division between the parties hereto of the monies withdrawn by plaintiff from the joint bank accounts of the parties hereto, as aforesaid, and for all further relief, both legal and equitable, to which this defendant may be entitled in the premises." (R. 11)

The respondent's action for a divorce and a property settlement and the petitioner's action for the delivery of the stocks, which he filed against respondent in the Ohio court while the Florida action was pleading, though not consolidated, were tried together, upon the stipulation of counsel that the evidence in the divorce case would practically determine both cases. (R. 22).

The Trial Court found that but for the divorce decree entered in Florida, the respondent was entitled to a divorce; and, as alimony, allowed her certain cash, bonds and jewelry; and ordered the respondent to cause to be transferred to her 1250 shares of the General Motors stock.

ARGUMENT

I

The Court Did Not Err in Granting Alimony

The petitioner, in his ARGUMENT I, concedes, that *if Florida was not the matrimonial domicile, no question of* full faith and credit is involved, and the question of whether the respondent could have alimony, support or separate maintenance, after the ex parte Florida divorce, is controlled by Ohio law and public policy.

In making that concession, petitioner refers to *Cox* v. *Cox*, 19 O.S. 502, and *Slapp* v. *Slapp*, 143 O.S. 105, as cases determining that Ohio under its local law holds that a wife may sue for alimony or separate maintenance after an ex parte divorce; and to *Stewart* v. *Stewart*, 155 Fla. 158, 153 So. 114, and *Paw-*

ley v. *Pawley*, 46 So. 2nd, 464, as cases determining that Florida under its local law holds that an action for alimony or separate maintenance does not survive an ex parte divorce.

This correctly states the Ohio rule but not that of Florida. The only thing decided in the *Stewart* case was that where a wife sued for divorce and the husband answered pleading a Nevada decree, temporary maintenance and expenses would not be allowed pending determination and adjudication of the validity of the Nevada decree. In the *Pawley* case the court held it is the law in Florida that a valid final decree in a divorce suit in one state is res judicata in another state as to the right of the wife to alimony if the court has jurisdiction to grant or deny alimony and the question is in issue and is actually heard and determined or is necessarily involved, but the doctrine does not apply where the divorce is granted the husband in an ex parte proceeding wherein the court acquired no jurisdiction other than by constructive service. *Pawley* v. *Pawley*, 46 So. 2d. 464, 28 A.L.R. 2d 1358, cert. den. 10-23-50, 340 U.S. 866.

Petitioner also cites *Gullet* v. *Gullet*, 149 Fed. 2nd. 17 (C.A. D.C.) as authority for his statement that in other jurisdictions the wife's action for alimony does not survive an ex parte divorce, and in so doing, perhaps, overlooked *Hopson* v. *Hopson*, 221 Fed. 2nd. 839, wherein that court *in banc*, with six of the eight judges present concurring said:

> "In the present case also, we think the full faith and credit clause does not operate as a bar to maintenance. We recognized in *Meredith* that the divisibility doctrine rested on the foreign court's lack of *in personam* jurisdiction over the non-appearing spouse and not upon the reduction of her maintenance right to judgment prior to the divorce. We said, 'While the *Estin* decision involved merely the enforcement of a maintenance order entered prior to the foreign divorce, its reasoning would seem to be equally applicable to an original grant of maintenance

after the divorce. Either may be done consistently with the full faith and credit clause." We find no basis in that reasoning for drawing a distinction, so far as full faith and credit are concerned, between an original grant of maintenance after the divorce in a suit filed prior to the divorce; as in *Meredith*, and such a grant in a suit filed after the divorce, as in the present case. Moreover, it seems to us that it would unduly exalt form over substance to draw any rigid distinction since the claim sued upon in *Meredith* and the one reduced to judgment in *Estin* flow from the same substantive rights as the one neither sued upon nor reduced to judgment in the present case. We therefore hold that a grant of maintenance in a suit filed after an *ex parte* foreign divorce is also consistent with the full faith and credit clause."

Long before this Court decided the first *Williams* v. *North Carolina* case, Ohio Courts had determined the public policy of Ohio to be that where the state where one of the parties was domiciled undertook to dissolve the marriage, Ohio would recognize the power of such other state to so dissolve it, but while a decree of divorce so rendered would be recognized, the state rendering it would not be permitted to project its jurisdiction into Ohio by constructive service, and thereby, affect property rights existing in Ohio by operation of Ohio law. *Cox* v. *Cox*, 19 O.S. 502; *Woods* v. *Waddle*, 44 O.S. 449; *McGill* v. *Deming*, 44 O.S. 645; *Doerr* v. *Forsythe*, 50 O.S. 726; *Bay* v. *Bay*, 85 O.S. 426; *Slapp* v. *Slapp*, 143 O.S. 105.

There is no distinction, in Ohio, as to the effect of a decree rendered in a foreign forum from that rendered in a domestic forum where the wife was served by publication only, and entered no appearance. *Cox* v. *Cox*, supra; *Stephenson* v. *Stephenson*, 54 O. App. 239; *Wick* v. *Wick*, 58 O. App. 72.

Petitioner, however, claims that Florida was the matrimonial domicile and as such had jurisdiction to settle all marital matters; that the Florida decree is res judicata as to respondents right to a division of property and alimony; and that Ohio

courts are therefore precluded from granting relief in accordance with local law.

II

The Fiction of Matrimonial Domicile is Not in This Case

In the trial of this case the pleadings and the evidence required the court to decide whether the Florida decree was res judicata as to the respondent's prayer for a divorce. As to alimony, however, neither the answer, nor petitioner's theory of the case, to which he adhered strictly throughout the trial, required the court to decide whether the Florida decree was res judicata as to the respondent's claims for a division of property and alimony. In his brief, filed with the Trial Judge before judgment was entered, the petitioner clearly states his theory of the case, as follows:

> "If plaintiff's action is barred by the Florida decree, as we contend, then this Court can only award alimony, unless the evidence would have justified, but for the Florida decree, the granting of the divorce to plaintiff, in which case the Court would be authorized to make a division of property, as was done in the *Slapp* case."

The familiar rule that res judicata is a defense and if not pleaded is waived, is settled law in Ohio. *State, ex rel.* v. *Morrow*, 131 O.S. 266. The petitioners answer contained no plea of res judicata as to alimony, in that there was no plea that the Florida court had denied alimony. The petitioner having waived the defense of res judicata and having elected to make his defense upon the theory that the Trial Court could allow alimony, he was in no position after judgment was entered to claim there had been a denial of full faith and credit.

This is so since the Ohio appellate courts have followed the principle that where a case has been tried upon a theory adopted by a party, to which he has adhered strictly through-

out the trial, they will not at his behest upon appeal on law questions consider the appeal on any other theory. *Hiller v. Shaw*, 45 O. App., 303, *Vestich v. Sander*, 86 O. App. 234.

Nevertheless, after the judgment was entered the petitioner retained Robert N. Gorman as his counsel to prosecute an appeal and the fiction of matrimonial domicile came into the case. In his appeal petitioner now argues that Mr. Justice Douglas in writing the opinion in *Estin v. Estin*, 334 U.S. 541, approved *Thompson v. Thompson*, 226 U.S. 551, by his reference to it in footnote 4; that by reason of such approval the doctrine of matrimonial domicile has not been entirely discarded by this Court; that Florida was the state of matrimonial domicile; and that *Thompson v. Thompson* required the Ohio courts give full faith and credit to that part of the Florida decree which he claims denied alimony, notwithstanding there was an absence of personal service and no entry of appearance.

Since the foregoing claims were not preserved in the Trial Court as the basis for claimed error we submit the Supreme Court of Ohio did not err in rejecting petitioners second Assignment of Error. (R. 309).

III

Florida Was Not The Matrimonial Domicile

In *Williams v. North Carolina*, 317 U.S. 287, this court, referring to "matrimonial domicile", said:

> "And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go, while if he is to blame, he retains no such power. But such considerations are inapposite. As stated by Mr. Justice Holmes in his dissent in the *Haddock* case, (201 U.S.P. 630, 50 L. ed 894, 26 S. Ct. 525, 5 Ann Cas 1) they con-

stitute a pure fiction, and fiction always is a poor ground for changing substantial rights. Furthermore, the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this Court would ultimately have to pass. . . .

"*Atherton* v. *Atherton* which preceded *Haddock* v. *Haddock* and *Thompson* v. *Thompson*, 226 U.S. 551, 57 L. ed 347, 33 S. Ct. 129, which followed it, recognized that the power of the state of the matrimonial domicile to grant a divorce from the absent spouse did not depend on whether his departure from the state was or was not justified. As stated above, we see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to pick out any such line of distinction in the generality of the words of the full faith and credit clause. Moreover, so far as state power is concerned no distinction between a matrimonial domicile and a domicile later acquired has been suggested or is apparent."

and again in *Williams* v. *State of North Carolina*, 325 U.S. 231, this court said:

"The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina*, 317 U.S. 287, 87 L.ed 279, 63 S. Ct. 207, 143 A.L.R. 1273, supra, the jurisdictional requirements of domicile is freed from the confusing refinement about 'matrimonial domicile.'"

We recognize this Court "cannot, by making 'jurisdiction' depend upon a determination of who is the deserter and who the deserted, or upon the shifting notions of policy concealed by the cloudy abstraction of 'matrimonial domicile,' turn this into a divorce and probate court of the United States." 317 U. S. 303.

We, therefore, suggest that the trial court, having heard the testimony of both parties and their witnesses; having examined the dentist's record (Ex. 7, R. 87) and the petitioners promise to mend his ways (Ex. 1, R. 87); and having heard the detailed description of his cruel treatment that caused the final separation, upon consideration of respondents amended petition, which charged gross neglect of duty and extreme cruelty, entered judgment finding "from all the evidence in this case that plaintiff, Mary R. Armstrong, were it not for said Florida decree, would be entitled to a judgment granting to her a divorce" (R. 17).

The law of Virginia as it was when *Thompson* v. *Thompson* was decided formed the basis for the fiction that the unity of the persons of the spouses carried with it the unity of the domicile; and that caused the Virginia court, as ground for its *in personam* jurisdiction over her, to assume Mrs. Thompson was legally present at the husbands Virginia domicile though in fact she was absent and living in the District of Columbia. The fiction precluded her from showing she had established her separate domicile because her husband had been guilty of cruel treatment of such character as to compel her to leave him.

The fiction no longer exists in Virginia and if the Thompson case was before a Virginia court under now existing laws, no such conclusion would be reached. *Com.* v. *Rutherfoord*, 160 Va. 524, 169 S.E. 909, 90 A.L.R. 348.

The fiction does not exist in Florida and the courts of that state hold that the husband is the head of the family and a residence established by him is the residence of the wife unless through his fault she is compelled to leave the family domicile and establish a domicile of her own. *Frank* v. *Frank*, 75 So. 2nd. 282.

Since the monolithic conception that husband and wife are one and the same person has long since ceased to be valid no reason exists for precluding the wife from proving she was justified in leaving her husband. The finding of the Trial

Court that petitioners gross neglect of duty and extreme cruelty were such as to entitle the respondent to a divorce is also sufficient to preclude him from claiming that Florida was the matrimonial domicile.

IV.

In Ohio, and in Florida, Alimony Comprehends More Than a Duty to Support

In *Estin* v. *Estin*, and in the other full faith and credit divorce cases that have been before this court, the subject matter involved claims to separate maintenance. The right of a wife to have her husband support her is a right incident to the marriage. This case involves more than an incident to the marriage. Here the respondent through her own testimony and that of her witnesses proved that prior to the marriage she contributed her funds and property and her labor to the establishment of a business which prior to and after the marriage provided profits which were invested in 600 shares of General Motors stock and other property. Since no finding of facts was requested we have a right to assume that the Trial Courts judgment is supported by that testimony. That being true the respondent was justified in claiming an equitable share in the ownership of that property; and her claim did not arise as an incident of the marriage.

In *Klump* v. *Klump*, 96 O. App. 93; 101, the Court said:

> "It was held in *Fisher* v. *Fisher*, 78 O. App. 125, 64 N. E. (2d), 328, that "an equitable distribution of money and property acquired by the parties during their married life", where a divorce is granted the wife, is not an award of alimony even though it is so designated. In the opinion of the court, at page 127, Judge Miller put his finger on the statutory duty imposed on the trial court, in clear and discriminating language, as follows:

"The court could well have made the property division which is carried in the entry if the decree had been granted to the husband for the wife's agression, because such division was nothing more or less than an equitable division of the property. Alimony begins when the court requires the payment to be made to a party from the aggressor's property, money or earnings."

That this is also the law in Florida is recognized in *Engebretsen* v. *Engebretsen*, 11 So. 2d 322, where the Court said:

"When a wife contributes her industry and labor or when she advances money to a business operated by her husband during coverture she cannot be deprived of her property, because the law will not permit or allow a forfeiture thereof to the husband when marital difficulties appear on the horizon, but the fruits of her labor and industry, or the money advanced, are special equities for adjudication."

In *Heath* v. *Heath*, 138 So. 796, 82 A. L. R. 537, the Supreme Court of Florida said:

"There is undoubted proof that the wife materially assisted the husband in the conduct of his business of operating a chain of stores and that she put into her husband's business a substantial amount of her own capital in addition to what personal services she rendered. Whatever consequences the wife may be compelled under the law to suffer for her marital derelictions by the severance of the bonds of matrimony, she is not required to incur the forfeiture of any of her already vested equitable property rights which were acquired by her while the matrimonial barque was sailing on smoother seas. See *Carlton* v. *Carlton*, 78 Fla. 252, 83 So. 87; *Taylor* v. *Taylor*, 100 Fla. 1009, 130 So. 713.

"The provisions of section 4987, Comp. Gen. Laws, section 3195, Rev. Gen. St., to the effect that no alimony shall be granted to an adulterous wife, do not preclude the ascertainment and allowance by the court of an amount to the wife for her special equity in property

and business of the husband toward which she is shown to have contributed materially in funds and industry through a period of years while the marriage remained undissolved.

"Such an allowance is not alimony and should never be made in any case unless shown to be warranted by special facts and circumstances which support a finding of an equity in the husband's property arising in favor of the wife from contributions of funds and services made by her toward its accumulation over, above, and beyond the performance of ordinary marital duties toward the husband."

The right which Mrs. Armstrong claimed to an equitable division of the property accumulated, as the result of her investment of capital and her labor, before and after the marriage, therefore, was not a mere incident of the marital status. It was a right *in personam*, which the ex parte Florida divorce could not and did not destroy.

V

The Florida Court Had No Jurisdiction to Deny Alimony

As we read the Florida statutes (Chapter 65, Sections 65.07-65.08) the jurisdiction of its courts to determine alimony can be invoked only by a wife; and if that be true the court had no alimony jurisdiction in this case. Those statutes and the fact that the fiction of matrimonial domicile is lacking or ineffective make up the wide difference between *Thompson* v. *Thompson* and this case. The court held, in the *Thompson* case, that under the laws of Virginia, the wife, since she was the offender, could not have alimony on a divorce decreed in favor of her husband. In this case if the respondent had invoked the jurisdiction of the Florida court to determine alimony, the chancellor would have been called upon to exercise

a reasonable discretion in granting alimony, since no claim was made she had been guilty of adultery. *Cowan* v. *Cowan*, 147 Fla. 473, 2 So. 2d 869.

If the foregoing is not correct then we suggest the court had no in personam jurisdiction in this case. The right of the respondent to an equitable division of the property here involved is a property right equal to and perhaps exceeding the property right which this court said Mrs. Estin had in her New York judgment.

If we take the liberty of paraphrasing the language of Mr. Justice Douglas in the *Estin* case, the lack of jurisdiction here may be stated as follows:

> The Florida decree, which recognizes that the courts of Ohio will have the ultimate determination of the question of property rights where the property itself is in the state of Ohio, and makes finding that the stock certificates and bonds are the property of the petitioner, and directs and specifically orders the respondent to return said stock certificates and bonds to the petitioner within fifteen (15) days from the entering of the decree, or be subject to an order for contempt, is nothing less than an attempt by Florida to restrain respondent from asserting her claim to an equitable division of that property. That is an attempt to exercise an in personam jurisdiction over a person not before the court. That may not be done since Florida has no power to adjudicate respondents rights in the property in Ohio, the Ohio courts need not give full faith and credit to that phase of the Florida judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and the statute of the United States demand. (334 U. S. 548, 549).

In an effort to avoid the consequences of the *Estin* case the petitioner claims that distinctions between decrees in personam and in rem have long since lost their validity. The argument made in support of that contention appears to be founded

upon the claim that since the respondent had a residence in Florida prior to acquiring her separate domicile in Ohio and had actual notice of the Florida action that constructive service was all that was necessary to give the Florida court an *in personam* jurisdiction over her property rights. In *May* v. *Anderson*, 345 U. S. 528, this court said:

> "Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her in personam. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.
>
> "'It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.' *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401, and see 403, 37 S. Ct. 152, 155, 61 L. ed. 386; *Thompson* v. *Whitman*, 18 Wall. 457, 21 L. ed. 897; *D'Arcy* v. *Ketchum*, 11 How. 165, 13 L. ed. 648.

"In *Estin* v. *Estin*, supra, and *Kreiger* v. *Kreiger*, supra, this court upheld the validity of a Nevada divorce obtained ex parte by a husband, resident in Nevada, insofar as it dissolved the bonds of matrimony. At the same time, we held Nevada powerless to cut off, in that proceeding, a spouse's right to financial support under the prior decree of another state. In the instant case, we recognize that a mother's right to custody of her children *is a personal right entitled to at least as much protection as her right to alimony.*" (Italics supplied.)

The father in that case had a better right to claim Wisconsin was the "matrimonial domicil" than the petitioner has to claim Florida was in this case; the mother had resided in Wisconsin before she apparently without justification, established her separate domicile in Ohio; and she was duly served by publication and had actual notice of the pendency of the Wisconsin action for divorce and custody of her children.

While he stops short of making the claim the petitioner seemingly argues that because of what the court said in *Mullane* v. *Hanover Bank and Trust Co.*, 339 U. S. 306, the decision in *May* v. *Anderson* should not have followed *Estin* v. *Estin* and related cases. We think it requires but a casual reading of the *Mullane* case to reach the conclusion that this court intended no such result.

VI

The Florida Court Did Not Deny Alimony

In view of the fact that the special masters report contained the following:

> "The question of the wife's alimony, if any, cannot be determined at this stage of the proceeding. At the present time the wife of the defendant has in her possession large sums of money belonging to the plaintiff and approximately $100,000.00 in stock and bonds. In addition thereto, she has a half interest in properties in the state of Ohio and other funds and properties not fully accounted for. I assume that this will be the subject matter of the litigation in Ohio, and that proper disposition will be made by the courts of that state."

and that the final decree contained the following:

> "This court takes recognition of the fact that litigation is now pending in the state of Ohio relative to the recovery of these stocks and bonds as well as the settle-

> ment of other matters concerning property rights between the parties. This court recognizes that the courts of Ohio will have the ultimate determination of the question of property rights where the property itself is in the state of Ohio, * * *"

it is difficult to find any merit in the petitioners repeated assertions, in his brief, that the Florida decree denied alimony.

When due consideration is given to the fact that the masters report was the subject of discussion between him and the petitioners Florida counsel and was not filed until after the agreement was made to pay him eight to ten times the fee that the court customarily allowed masters in uncontested divorce cases and that the decree was entered by the court on the day after the filing of the masters report, we think it is a reasonable assumption that both documents were cleverly prepared so as to give recognition to the fact that the Florida court had no jurisdiction to grant or deny an equitable division of property held by the respondent in Ohio and at the same time to so word the documents as to create obstacles in the path of the respondent in her pursuit of her remedy in the Ohio courts.

Be that as it may, an ex parte judgment for alimony, where there was no personal service and no appearance, is unenforcible in Florida, *Lucian* v. *Southern Ohio Bank and Trust Co.*, 156 Fla. 370, 23 So. 2nd. 674, *Peacock* v. *Peacock*, 160 Fla. 603, 36 So. 2nd. 206, and *Pawley* v. *Pawley*, supra, 28 A. L. R. 2d at page 1371. Under the Federal Statute such a judgment is entitled to no more faith and credit elsewhere than it is in Florida.

VII

No Part of the Florida Decree is Entitled to Full Faith and Credit

The special master's report contains the following:

> "A special masters fee in this cause has been settled by an agreement between the attorney for plaintiff and your master."

After the testimony was taken petitioners Florida attorney discussed with the special master his report (R. 291) and before the report was filed the agreement as to the fee was made (R. 292) which called for the payment of Two Hundred or Two Hundred Fifty Dollars. Since it was a private agreement the requirements of Section 62.07 Florida Statutes were not observed. The amount of the agreed fee was eight or ten times the amount customarily fixed by the court (Stipulation R. 311).

When this private agreement is considered in connection with the type of report filed it is possible the master was expressing his gratitude for not having to apply to the court to fix his compensation. At the last term this court decided *In Re Murchison*, 348, U. S. 894, and said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U. S. 510, 532, 47 S Ct.

437, 444, 71 L. ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias, and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way *justice must satisfy the appearance of justice*'. Offutt v. United States, 348 U. S. 11, 14, 75 S. Ct. 11, 13." (Emphasis supplied.)

If we apply the foregoing to what transpired prior to the filing of the masters report, we feel justified in claiming that the Florida proceeding lacks due process of law, and that the entire Florida decree is not entitled to full faith and credit.

VIII

The Ohio Court Had Jurisdiction to Divide the General Motors Stock

The petitioner in his ARGUMENT II contends the Ohio court did not have jurisdiction to award to the respondent 1250 shares of General Motors stock; and to support that argument, *inter alia*, claims the Florida court had jurisdiction over the *res* entitling it to determine ownership whether the respondent had been personally served with summons or not. It is claimed that the situs of the stock was in Florida, the domicile of the registered owner; and this claim is said to be supported by *First National Bank of Boston* v. *Maine* and *Curry* v. *McCanless*. The petitioner overlooks the fact that *First National Bank of Boston* v. *Maine* was overruled in *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174; and has failed to observe that *Curry* v. *McCanless* supports the holding in *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, where the court, at pages 439-440 said:

"It is true that fiction plays a part in the jurisprudential concept of control over intangibles. There is no fiction,

however, in the fact that choses in action, stock certificates and dividends held by the corporation, are property."

"We see no reason to doubt that, where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, control over them can only arise from control or power over the persons whose relationships are the source of the rights and obligations." Estin v. Estin, 334 U. S. 541, 548, 68 S. Ct. 1213, 1218, 92 L. Ed. 1561. Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible. Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found."

The right of the Ohio court to determine and control ownership differs from the Florida case in that the Ohio court had before it the respondent as plaintiff, the General Motors Corporation, personally served, as a defendant and the petitioner, who entered his appearance, as a defendant, whereas in the Florida court General Motors Corporation was not a defendant and the respondent was only constructively served. The Florida court did not and could not impound the stock certificates whereas the Ohio court did have jurisdiction of the certificates through personal service on General Motors Corporation as the obligor. 341 U. S. 432. The Ohio court having an *in personam* "control or power over the persons whose relationships are the source of the rights and obligations" had complete jurisdiction to determine the question of ownership. Only General Motors Corporation could question

venue, and since it did not there was nothing to prevent the Ohio court from exercising that jurisdiction. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437.

CONCLUSION

In the foregoing we have shown the Florida decree was not entitled to full faith and credit, such as would preclude a division of property and alimony; and, if such were not so, that res judicata as a defense to alimony was not pleaded and was waived.

Be that as it may, if res judicata had been pleaded, the Ohio court would then have been called upon to decide whether to give full faith and credit to that part of the Florida decree which reserved the determination of property rights to the Ohio courts, or to that part which it is claimed deprived the respondent of such rights. The inconsistent provisions are not proof of res judicata.

We respectfully submit, the judgment of the Supreme Court of Ohio, pertaining to alimony for respondent should be affirmed.

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